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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

CSAA INSURANCE EXCHANGE,

Plaintiff and Respondent,

v.

PREMIER RESTORATION &  
REMODEL, INC.,

Defendant and Appellant.

A155081

(San Francisco City & County  
Super. Ct. No. CGC-15-546518)

Premier Restoration & Remodel, Inc. (Premier) appeals from an order awarding attorney fees to plaintiff CSAA Insurance Exchange (CSAA). CSAA sued Premier for breach of written contract, negligence, and nuisance related to an insurance claim CSAA was required to pay for faulty repair work performed by Premier. The court entered judgment for CSAA, which then moved for attorney fees. The trial court awarded CSAA attorney fees pursuant to an indemnification provision in the parties' contract. Premier contends the indemnification provision in the contract only applies to third party actions and does not constitute a prevailing party attorney fee provision for a direct action between the parties. We agree and reverse the order awarding attorney fees.

**I. BACKGROUND**

**A. *Factual Background***

Premier entered into a written "Direct Repair Network Agreement" (DRN agreement) with CSAA. The purpose of the DRN agreement was to provide CSAA with

prescreened and experienced contractors to repair dwellings insured by CSAA pursuant to certain standards and terms.

Section 3.2 of the DRN agreement set forth an indemnification provision, which stated: “Vendor will indemnify, defend and hold harmless [CSAA], their past and present directors, officers and employees from any and all claims, demands, causes of action, losses, damages, fines, penalties, liability, costs and expenses, including reasonable attorney’s fees and court costs, sustained or incurred by or asserted against [CSAA] by reason of or arising out of the act or failure to act of Vendor or the sublet provider. This indemnity will survive the termination of this Agreement and/or any transfer of the ownership of Vendor’s business. [CSAA] shall have the sole and exclusive right to select counsel of its own choice to defend it or them pursuant to the terms of this paragraph.” The DRN agreement does not contain any other indemnification provisions or any other provisions referencing recovery of attorney fees.

Pursuant to the DRN agreement, CSAA recommended Premier to a customer who experienced a broken water pipe and resulting water damage. The customer subsequently hired Premier and, as part of its repairs, Premier applied a disinfectant to remediate and prevent mold growth. The disinfectant caused an unpleasant odor, and efforts to mitigate the odor were unsuccessful. After a lengthy investigation, CSAA ultimately agreed to demolish and rebuild the customer’s house, including its concrete foundation.

### ***B. Procedural History***

CSAA filed a lawsuit to recover the money it incurred to resolve the odor problem. The complaint alleged causes of action against Premier for (1) breach of written contract, (2) negligence, and (3) nuisance. CSAA alleged in relevant part that Premier breached the DRN agreement by failing to perform the repairs in a “neat, skillful and workmanlike manner,” by using and applying the disinfectant inappropriately, and by failing to guarantee its work. CSAA also alleged Premier breached the DRN agreement by not indemnifying CSAA from its losses and damages incurred as a result of the customer’s claim.

The complaint sought reimbursement of expenses incurred in connection with repairs to the residence, the customer's loss of use of the residence, the customer's personal property damage, the investigation of the odor issues, and CSAA's attorney fees and costs.

Following a seven-day bench trial, the court found Premier had violated the DRN agreement because it "did not provide exceptional service[,] has not indemnified and held harmless CSAA for the cost of remediating the malodor problem," failed "to employ qualified and experienced workers," failed "to be in full control of [its] workers and sub-contractors," provided "untrained workers who did not know the proper and safe use of" the disinfectant, and failed "to stand behind its guarantee." The court held CSAA was entitled to recover reasonable attorney fees pursuant to section 3.2 of the DRN agreement.

The court subsequently entered judgment in favor of CSAA on all issues. It awarded damages and prejudgment interest in the amount of \$2,003,860.93, plus additional prejudgment interest in the amount of \$226,604.60. The judgment also awarded CSAA its costs in an amount to be determined.

Following entry of judgment, CSAA filed a motion for attorney fees based on section 3.2 of the DRN agreement and Civil Code section 1717. Premier opposed the motion, arguing section 3.2 of the DRN agreement was a third party indemnity clause that did not provide for the prevailing party to recover fees in a direct action on the contract. The trial court granted the motion and awarded CSAA \$841,980 in attorney fees "based on Section 3.2 of the Direct Repair Network (DRN) agreement between CSAA and Premier." The trial court examined the entirety of the DRN agreement and concluded the parties intended for Premier to indemnify CSAA "for losses incurred in actions between CSAA and Premier on the enforcement of the DRN agreement itself." The court based this holding on the "broad wording" of section 3.2 and the choice of law provision in section 5.19 of the DRN agreement. Premier timely appealed.

## II. DISCUSSION

Premier argues the DRN agreement does not authorize CSAA to recover attorney fees it incurred in its action to enforce the DRN agreement. We agree.

### A. *Standard of Review*

“Whether [an indemnitee] is entitled to recover attorney fees incurred in enforcing the indemnity agreement, as opposed to recovering attorney fees incurred in defending the underlying claims, depends on the language of the contract.” (*Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500, 508 (*Continental*).) “Indemnity agreements are construed under the same rules that govern the interpretation of other contracts.” (*Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 600 (*Alki Partners*).) “The basic goal of contract interpretation is to give effect to the parties’ mutual intent at the time of contracting. [Citations.] When a contract is reduced to writing, the parties’ intention is determined from the writing alone, if possible. [Citation.] ‘The words of a contract are to be understood in their ordinary and popular sense.’ ” (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955; *Alki Partners*, at p. 600 [“The intention of the parties is to be ascertained from the ‘clear and explicit’ contract language.”].)

“Generally, the inclusion of attorney fees as an item of loss in a third party claim-indemnity provision does not constitute a provision for the award of attorney fees in an action on the contract which is required to trigger [Civil Code] section 1717.” (*Carr Business Enterprises, Inc. v. City of Chowchilla* (2008) 166 Cal.App.4th 14, 20 (*Carr Business Enterprises*).) A corollary of this rule is attorney fees “are not available in the prosecution of an indemnity action absent clear language in the indemnity agreement stating the parties contemplated an award of fees for enforcing the agreement.” (*Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 224–225 (*Torres*); *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 971 (*Myers*) [“A provision including attorney fees as an item of loss in an indemnity clause is not a provision for attorney fees in an action to enforce the contract”].)

Courts examine both the language of the indemnification provision and the context in which the language appears to assess whether a provision includes an award of attorney fees in an action on the contract. (*Alki Partners, supra*, 4 Cal.App.5th at pp. 600–601.) Based on this review, courts must assess whether there is any language “ ‘which reasonably can be interpreted as addressing the issue of an action between the parties on the contract.’ ” (*Id.* at p. 601.)

“Interpretation of a written contract is a question of law for the court unless that interpretation depends upon resolving a conflict in properly admitted extrinsic evidence.” (*Alki Partners, supra*, 4 Cal.App.5th at p. 599.) “ ‘[E]xtrinsic evidence cannot be used to vary or contradict the instrument’s express terms,’ ” but may “be admitted to explain the meaning of the contractual language at issue.” (*Hot Rods, LLC v. Northrop Grumman Systems Corp.* (2015) 242 Cal.App.4th 1166, 1175 (*Hot Rods*).)<sup>1</sup>

### **B. Section 3.2 of the DRN Agreement**

We first examine the language of the indemnification provision to determine whether it can reasonably be interpreted as encompassing the attorney fees at issue. The provision states: “Vendor will indemnify, defend and hold harmless [CSAA] . . . from any and all claims, demands, causes of action, losses, damages, fines, penalties, liabilities, costs and expenses, including reasonable attorney’s fees and court costs, sustained or incurred by or asserted against [CSAA] by reason of or arising out of the act or failure to act of Vendor or the sublet provider.” While the provision references indemnity, that alone does not determine the scope of the provision. “ ‘Although indemnity generally relates to third party claims, “this general rule does not apply if the parties to a contract use the term ‘indemnity’ to include direct liability as well as third party liability.’ ” ” (*Hot Rods, supra*, 242 Cal.App.4th at p. 1179.)

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<sup>1</sup> While CSAA argues extrinsic evidence was offered and considered by the trial court when interpreting the DRN agreement, neither party provides any comprehensive argument regarding what extrinsic evidence is relevant to interpreting the DRN agreement or how such evidence impacts interpretation of the contractual language at issue.

CSAA attempts to draw a distinction between indemnification provisions that encompass negligent conduct and those that solely indemnify contractual obligations. CSAA argues only those indemnification provisions limited to contractual obligations prohibit recovery on direct actions between the parties, whereas indemnification provisions encompassing negligence allow recovery on direct actions. CSAA contends the indemnification provision at issue includes acts of negligence and thus allows for recovery on direct actions. However, no authority has identified or supported such a distinction. Instead, courts look for “clear language in the indemnity agreement stating the parties contemplated an award of fees for enforcing the agreement.” (*Torres, supra*, 154 Cal.App.4th at pp. 224–225.) Here, nothing in the paragraph suggests the parties intended this provision to vary from the general presumption that indemnity relates to third party claims. (Accord Civ. Code, § 1644 [unless given some special meaning by the parties, “[t]he words of a contract are to be understood in their ordinary and popular sense”].)

The cases relied upon by CSAA are distinguishable on this basis. For example, in *Zalkind v. Ceradyne, Inc.* (2011) 194 Cal.App.4th 1010, 1022 (*Zalkind*), the asset purchase agreement at issue stated the buyer would indemnify the seller from “ ‘any and all Damages that arise from or are in connection with: [¶] . . . [¶] (b) Any breach or default by the Buyer of its covenants or agreements contained in this Agreement.’ ” The agreement defined “ ‘Damages’ ” as including both losses arising from traditional third party claims as well as any losses “ ‘incurred by any indemnified party . . . *whether or not* they have arisen from or were incurred in or as a result of any’ ” third party claims. (*Id.* at p. 1023, italics omitted and added.) The court explained the indemnification provision, coupled with the “damages” definition, expanded indemnification beyond third party claims “to ‘any and all’ damages incurred by the [plaintiffs] arising out of [defendant’s] breach of the Asset Purchase Agreement.” (*Id.* at p. 1027.)

Similarly, in *Hot Rods, supra*, 242 Cal.App.4th 1166, the purchase and sale agreement indemnified the buyer from any “ ‘any claims, demands, penalties, fees, fines, liability, damages, costs, losses, or other expenses including, without limitation,

reasonable environmental consulting fees and reasonable attorney fees.’ ” (*Id.* at p. 1181, italics omitted.) The agreement then defined “ ‘Claim’ ” as “ ‘any claim or demand by any Person for any alleged liabilities, whether based in contract, tort, implied or express warranty,’ ” and defined “ ‘Person’ ” as “ ‘any person, employee, individual, corporation, unincorporated association, partnership, trust, federal, state or local governmental agency, authority or other private or public entity.’ ” (*Ibid.*) The court concluded, in light of these broad definitions of “claim” and “person,” that the indemnification provision encompassed both first and third party claims.<sup>2</sup>

Here, however, CSAA cannot identify any similar language in the DRN agreement. For example, the DRN agreement does not contain broad definitions of “claim” or “damage” that indicate an intent to encompass attorney fees for direct actions. Nor does it explicitly include such claims. (See, e.g., *Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 556 [provision indemnified against all losses “ ‘whether or not arising out of third party Claims’ ”]; *Baldwin Builders v. Coast Plastering Corp.* (2005) 125 Cal.App.4th 1339, 1344, 1342 [allowed recovery of attorney fees in action on contract based on provision stating, “ ‘Subcontractor shall pay all costs, including attorney’s fees, incurred in enforcing this indemnity agreement’ ”].) Instead, the indemnification provision in the DRN agreement only covers “any and all” harm caused “by reason of or arising out of the act or failure to act of Vendor or the sublet provider.” This language, alone, is insufficient to demonstrate the parties intended the provision to provide for attorney fees on direct claims.

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<sup>2</sup> The other cases cited by CSAA are equally inapplicable. (See *Wilshire-Doheny Associates, Ltd. v. Shapiro* (2000) 83 Cal.App.4th 1380, 1396 (*Wilshire-Doheny*) [indemnification provision applied to lawsuit between corporate officers and corporation, because the provision “specifically applie[d] to an ‘action or suit by . . . the corporation to procure a judgment in its favor’ ”]; *Nicholson-Brown, Inc. v. City of San Jose* (1976) 62 Cal.App.3d 526, 535 [affirming indemnification as to third party claim]; *In re Marriage of Vaughn* (2018) 29 Cal.App.5th 451, 460 [concluding ex-spouse’s promise to indemnify other spouse for losses she suffered when he failed to repay his debt was nondischargeable in bankruptcy].)

In *Alki Partners, supra*, 4 Cal.App.5th 574, the court addressed a similar indemnification clause to the one at issue in this matter and concluded it did not grant the prevailing party a right to recover attorney fees. The agreement analyzed in *Alki Partners* stated the plaintiff would indemnify the defendant “for all losses, including attorney fees ‘resulting in any way from the performance or non-performance of [the defendant’s] duties hereunder.’ ” (*Id.* at p. 602.) The court found this language similar to other indemnity provisions where recovery of fees on a direct action was disallowed. (*Ibid.*, citing *Carr Business Enterprises, supra*, 166 Cal.App.4th at pp. 19, 23 [attorney fees denied where contract indemnified against “ ‘all claims, damages, losses and expenses including attorney fees arising out of the performance of the work described herein’ ” (italics omitted)] and *Myers, supra*, 13 Cal.App.4th at pp. 963–964, 973 [indemnification provision covering “all claims . . . arising out of or resulting from the performance of the Work” did not encompass award of attorney fees on direct action].)<sup>3</sup>

The language in the DRN agreement addressing indemnification for losses “by reason of or arising out of the act or failure to act” is materially indistinguishable from the language in *Alki Partners* addressing losses “ ‘resulting in any way from the performance or non-performance of [the defendant’s] duties.’ ” (*Alki Partners, supra*, 4 Cal.App.5th at p. 598.) And, for the same reasons expressed in *Alki Partners*, we conclude the indemnification provision in the DRN agreement does not grant CSAA a right to recover attorney fees in an action to enforce the DRN agreement.

Nor does the DRN agreement, considered in its entirety, support CSAA’s position. The preceding sections of the DRN agreement discuss the services Premier was expected to perform. The section containing the indemnity provision is titled “Assurance of

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<sup>3</sup> CSAA argues *Alki Partners* and the cases cited therein are distinguishable because they involve contract-based indemnification provisions whereas the harm caused by Premier was its negligence in performing repairs and its failure to indemnify CSAA. In addition to the lack of authority supporting this alleged distinction between contract-based and negligence-based indemnification provisions, we note Premier’s work performance and its duty to indemnify CSAA were contractual obligations as they both arose from the DRN agreement.

Quality,” and the surrounding provisions impose various insurance coverage and warranty obligations on Premier. None of these surrounding sections or paragraphs indicate the parties intended the indemnity provision to apply to direct actions, and CSAA does not assert such an argument. Instead, CSAA only argues the choice of law provision evidences an intent by the parties to include direct actions within the indemnification provision. We disagree. Contracts frequently contain choice of law provisions. We are unaware of any authority suggesting a choice of law provision evidences, by itself, an intent to provide contractual attorney fees to the prevailing party.<sup>4</sup> Rather, the choice of law provision only instructs the court to apply California law when interpreting whether the indemnification provision encompasses direct actions.

While no provision of the DRN agreement supports CSAA’s interpretation, the last sentence of the indemnification provision further strengthens our conclusion. That sentence states “[CSAA] shall have the sole and exclusive right to select counsel of its own choice to defend it or them pursuant to the terms of this paragraph.” Preserving the right to select counsel is illogical in the context of a direct action. CSAA argues this statement is designed to only reference “one part” of the indemnity agreement, i.e., third party claims. However, the reservation of the right to select counsel is “pursuant to the terms of this paragraph.” It is not limited in any manner. The sentence thus cannot reasonably be interpreted as applying to only “one part” of the indemnification provision.

We conclude the indemnification provision at issue more closely parallels those found in *Alki Partners*, *Carr Business Enterprises*, and *Myers* than the provisions in *Zalkind*, *Hot Rods*, and *Wilshire-Doheny*. Accordingly, CSAA is not entitled to recover attorney fees incurred in pursuing its breach of contract claim against Premier.

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<sup>4</sup> Some courts have applied a choice of law provision to make a unilateral attorney fee provision reciprocal. (See, e.g., *ABF Capital Corp. v. Grove Properties Co.* (2005) 126 Cal.App.4th 204, 217–218, 220 [Civ. Code, § 1717 governs attorney fees in part because reciprocal fees provision of the statute is fundamental policy of California and conflicts with chosen state’s law].) Those cases, however, do not conclude a choice of law provision could turn an indemnity provision into an attorney fee provision.

### **III. DISPOSITION**

The order awarding attorney fees is reversed. Premier may recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

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Margulies, Acting P. J.

We concur:

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Banke, J.

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Sanchez, J.

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